

Supreme Court, U. S.

FILED

DEC 15 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-823

SPARTAN ELECTRICAL CONSTRUCTION
COMPANY, INC.,

v.

THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

and

GEORGE T. DUKES, Director, Civil Rights and Urban
Affairs Division, United States Environmental Protection
Agency and CALVIN CARTER, Officer, Civil Rights
and Urban Affairs Division, Environmental Protection
Agency.

APPEAL OF SPARTAN ELECTRICAL CONSTRUCTION COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA AT No. 73-1491 CIVIL
ACTION AND FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT AT No. 76-1109.

STATEMENT OF JURISDICTION

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DATAVIA TIMES, APPELLATE COURT PRINTERS
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CONSTITUTION.

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United States Supreme Court

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and

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Affairs Division, United States Environmental Protection
Agency and CALVIN CARTER, Officer, Civil Rights and
Urban Affairs Division, Environmental Protection Agency.**

Appeal of Spartan Electrical Construction Co.

**Appeal From The United States District Court
For The Eastern District Of Pennsylvania**

To the Honorable, the Chief Justice and the Justices of the Supreme Court of the United States, the Appellant, Spartan Electrical Construction Company Respectfully Presents its:

JURISDICTIONAL STATEMENT

(a) There are no known official or unofficial reports of opinions on the issue raised in either the United States Court of Appeals for the Third Circuit, or the United States District Court for the Eastern District of Pennsylvania.

(b) (i) This is an appeal from a judgment predicated upon findings made from the bench. The action was based upon several statutes as to the civil rights aspect, which is not appealed. This appeal involves the unresolved direct action against a governmental agency under the Constitution, Amendment V for deprivation of property rights without due process of law.

(ii) The date of the Judgment Order of the United States Court of Appeals for the Third Circuit, dated September 20, 1976, is that sought to be reviewed.

(iii) The jurisdiction of this Court obtains under Article III, Section 2, paragraph 1 of the United States Constitution as a case arising under the said Constitution, at Amendment Article V, wherein "No person shall be deprived of property, without due process of law,"

(c) May an agency of the Federal Government ignore a contractor's request for a due process hearing, and without a hearing on the evidence, nonetheless declare the contractor to be a "non-responsive contractor", which status divested it of property rights as lowest responsible bidder under state law?

(d) It was proved in the trial court that:

(i) Quincy Norwood is the President and sole (permanent) employee of Spartan Electrical Construction Company, Inc.

(ii) The Municipal Authority of the Borough of Morrisville (Authority) a state agency wished to expand its waste water treatment facilities, was promised an EPA Federal grant of money, and accordingly the authority advertised the work for bid.

(iii) The agent of the Authority was its engineer, Albright and Friel, who provided plaintiffs with a 3" book of specifications for bidding on about April 15, 1973.

(iv) The addendum to the specifications which comes into question was delivered some time after April 25, 1973, the bid opening being scheduled for May 17, 1973.

(v) The addendum received included a large packet of yellow pages, dealing primarily with the so-called "Philadelphia Plan". The form received was obsolete in that the manpower goals were not "guided" for the year 1974 and beyond, so there was no standard whatever to apply to 1974 or 1975, in addition to a further ambiguity as to whether the percentages called for were to represent "man-hours" or "persons" on the work force.

(vi) Until well into 1974, only Mr. Norwood, who is white, would be needed to man the job.

(vii) The ambiguities in the "Philadelphia Plan" were not discovered until the "Nth hour".

(viii) Plaintiff corporation bid and was declared lowest apparent responsible bidder, with a notation the Philadelphia Plan was not included in its bid.

(ix) Thereafter, a series of letters, which are exhibits, issued from (a) plaintiff corporation and its counsel expressing complete willingness to comply with whatever requirements were set as to the Philadelphia Plan, (b) from the agent-engineers of the Authority indicating its willingness to "waive the informality" (c) and to officers of the EPA involved to the same effect, *requesting a hearing on the matter*.

(x) The officers of the EPA nevertheless without hearing any evidence declared the plaintiff a "non-responsive" bidder, foreclosing federal funds to the Authority if such a bidder was in fact awarded the contract. The Authority did in fact award to another bidder, contrary to state law.

(xi) No legal reason whatever was given to justify the EPA's decision.

After trial the Court below made the following findings from the bench.

"The Court: All right. I have listened to the case very carefully and I am satisfied and I am persuaded that the only reason for the rejection of Mr. Norwood's bid was the fact that it did not comply with the bid requirements, that is, that it did not have attached thereto an appendix which would indicate the compliance or proposed compliance with the Philadelphia Plan.

"I further find Mr. Norwood knew that was a requirement and I further find he was familiar with it.

"There is absolutely no evidence that I find credible that Mr. Carter or Mr. Dukes or anybody in the EPA discriminated against Mr. Norwood because of his race. The only discrimination was that he had to be selected out because his bid did not comply with the bid requirements and he was in the same position as two other bidders.

"It would seem to me that we would be practicing discrimination if we discriminated against those who did comply with the requirements by allowing others to meet the prerequisites by amended filings or late filings.

"I find that the employees of the EPA were motivated only by their understanding of the requirements of the law, that any bid must be accompanied by a Philadelphia Plan proposal.

"Accordingly, it is my judgment that the defendants are entitled to judgment in this case.

"That is my finding."

(Judgment was so entered.)

(xii) While plaintiff, Quincy Norwood feels that the Court below should have found in his favor on the issue of reverse discrimination, the fact is that the Court was persuaded otherwise, on that issue, which finding was not contested upon appeal to the United States Court of Appeals for the Third Circuit.

What was contested is the error of the trial Court in formulating and applying a legal precept, to wit: the effect of the Government's decision not to grant to Spartan Electric any sort of a hearing prior to declaring its bid "non-responsive". The issue was specifically within the Complaint, and argued all through the pre-trial stages, argued at the conclusion of the trial itself. Hence this appeal, and the appeal to the Third Circuit.

The issue raised is whether the decision of the Environmental Protection Agency to declare the plaintiff's bid to be non-responsive without granting the plaintiff a due process hearing, upon specific demand, deprived plaintiff of state-acquired property rights which were destroyed, and

therefore deprived to plaintiff within the meaning of the Fifth Amendment, without due process of law.

e. N.A.

f. The reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution are:

(i) Neither Court below has ruled or issued an opinion upon a fundamental issue of a right guaranteed by the Constitutions, having traceable antecedents to the Magna Carta, namely, the right to due process, especially at the hands of officials of the United States Government, with respect to actions taken prejudicial to property rights of a citizen of the United States. Nothing could be more substantial than an unanswered question of Federal Action taken in complete disregard of the "Bill of Rights".

(ii) The failure of the courts below to address the issue is a failure to enforce, or at least decide, a direct claim of right under the constitution.

g. The statement from the bench is quoted verbatim above. The single line judgment order of the Court of Appeals is attached as an exhibit.

h. N. A.

Respectfully submitted,

JOHN PHILIP DIEFENDERFER,
Stuckert, Yates and Krewson,
Attorneys for Appellant,
One South State Street,
Newtown, Pa. 18940.

IN THE UNITED STATES COURT OF APPEALS

For The Third Circuit

QUINCY NORWOOD and SPARTAN ELECTRICAL
CONSTRUCTION COMPANY, INC.,

vs.

THE UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY and GEORGE R. DUKES, Director, Civil
Rights and Urban Affairs Division, U.S. Environmental
Protection Agency and CALVIN CARTER, Officer Civil
Rights and Urban Affairs Division, E.P.A.

Civil Action
No. 76-1109

Notice of Appeal

Quincy Norwood and Spartan Electrical Construction
Company, Inc., respectfully appeals to the civil judgment or-
der entered September 20, 1976 in the above-captioned ac-
tion.

STUCKERT, YATES & KREWSON,
By: John Philip Diefenderfer,
John Philip Diefenderfer,
*Attorney for Quincy Norwood
and Spartan Electrical,*
I. D. No. 01933,
215-968-4701.

Exhibit "A"

UNITED STATES COURT OF APPEALS

For The Third Circuit

 No. 76-1109

 QUINCY NORWOOD and SPARTAN ELECTRICAL
 CONSTRUCTION COMPANY, INC.,
Appellants,

v.

 THE UNITED STATES ENVIRONMENTAL PROTECTION
 AGENCY and GEORGE T. DUKES, Director, Civil Rights
 and Urban Affairs Division, United States Environmental
 Protection Agency and CALVIN CARTER, Officer Civil
 Rights and Urban Affairs Division, Environmental Protec-
 tion Agency.

 (Civil No. 73-1491, E.D.Pa.)

Submitted Under Third Circuit Rule 12(6)

September 16, 1976

 BEFORE SEITZ, *Chief Judge*, ALDISERT and GIBBONS,
Circuit Judges.
Judgment Order

After consideration of all contentions raised by appellants,
 it is

ADJUDGED AND ORDERED that the judgment of the
 district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

 COLLINS J. SEITZ,
Chief Judge.

Attest:

 Thomas F. Quinn,
 Thomas F. Quinn,
 Clerk.

Dated: Sep 20 1976

Findings of the Court

. . .

entitled to judgment.

Thank you.

The Court: All right, do you want to respond?

Mr. Diefenderfer: I believe anything I might say in
 response would be repetitious, Your Honor. I know you have
 other matters pending before you.

I just make the notation that the Fifth Amendment has been raised in the complaint and has been discussed in the briefs and memorandum, so the Government cannot complain that that is a surprise.

Thank you.

The Court: All right. I have listened to the case very carefully and I am satisfied and I am persuaded that the only reason for the rejection of Mr. Norwood's bid was the fact that it did not comply with the bid requirements, that is, that it did not have attached thereto an appendix which would indicate the compliance or proposed compliance with the Philadelphia Plan.

I further find Mr. Norwood knew that was a requirement and I further find he was familiar with it.

There is absolutely no evidence that I find credible that Mr. Carter or Mr. Dukes or anybody in the E.P.A. discriminated against Mr. Norwood because of his race. The only discrimination was that he had to be selected out because his bid did not comply with the bid requirements and he was in the same position as two other bidders.

It would seem to me that we would be practicing discrimination if we discriminated against those who did comply with the requirements by allowing others to meet the prerequisites by amended filings or late filings.

I find that the employees of the E.P.A. were motivated only by their understanding of the requirements of the law, that any bid must be accompanied by a Philadelphia Plan proposal.

Accordingly, it is my judgment that the defendants are entitled to judgment in this case.

That is my finding.

Mr. Ezell: Thank you, Your Honor.

Mr. Diefenderfer: Thank you, Your Honor.

(Now, 2:45 o'clock p. m. court recesses.)

Reported by:
Elizabeth P. Mensch

Affidavit of Service

IN THE UNITED STATES COURT OF APPEALS

For The Third Circuit

**QUINCY NORWOOD and SPARTAN ELECTRICAL
CONSTRUCTION COMPANY, INC.,**

vs.

**THE UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY and GEORGE R. DUKES, Director, Civil Rights
and Urban Affairs Division, U.S. Environmental Protec-
tion Agency and CALVIN CARTER, Officer Civil Rights
and Urban Affairs Division, E.P.A.**

Civil Action No. 76-1109

Commonwealth of Pennsylvania }
 County of Bucks } ss.

I, ELIZABETH HABEL, being duly sworn according to law deposes and says that she is employed with the law firm of Stuckert, Yates and Krewson of One South State Street, Newtown, Pennsylvania 18940 and that on November 3, 1976 she mailed by certified mail, return receipt requested the attached Notice of Appeal to Ronald C. Gluck, Esquire at 1912 Biltmore Street, N.W. Washington, D.C. 20009 and that the attached return receipt card was received by this office as proof of service.

ELIZABETH HABEL,
 Elizabeth Habel.

Sworn to and Subscribed before
 me, this 3rd day of November,
 A.D., 1976.

SHIRLEY ANN WOOD, Notary Public
 Newtown, Bucks Co., Pa.
 My Commission Expires October 24, 1977

Letter Dated November 3, 1976

Law Offices
 STUCKERT, YATES & KREWSON
 Post Office Box 70
 1 South State Street
 Newtown, Bucks County, Pennsylvania 18940

November 3, 1976

Ronald C. Gluck, Esquire
 1912 Biltmore Street, N.W.
 Washington, D. C. 20009

Re: Quincy Norwood, et al., Appellants vs. The
 United States Environmental Protection Agency,
 et al. No. 76-1109

Dear Mr. Gluck:

Enclosed please find the Notice of Appeal in the above-captioned matter which I have filed with the United States Court of Appeals in Philadelphia.

Sincerely yours,

JPD:saw

Enclosure

cc: Solicitor General
 Department of Justice
 Washington, D. C. 20530

JOHN PHILIP DIEFENDERFER,
 John Philip Diefenderfer, SAW,
 Stuckert, Yates and Krewson.

Certified Mail
 Return Receipt Requested

PS Form 3811, Jan. 1975

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IN THE UNITED STATES COURT OF APPEALS

For The Third Circuit

**QUINCY NORWOOD and SPARTAN ELECTRICAL
CONSTRUCTION COMPANY, INC.,**

vs.

**THE UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY and GEORGE R. DUKES, Director, Civil Rights
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Civil Action No. 76-1109

Notice of Appeal

Quincy Norwood and Spartan Electrical Construction Company, Inc., respectfully appeals to the civil judgment order entered September 20, 1976 in the above-captioned action.

STUCKERT, YATES & KREWSON,
By: John Philip Diefenderfer,
John Philip Diefenderfer,
Attorney for Quincy Norwood
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I. D. No. 01933,
215-968-4701.

No. 76-823

Supreme Court, U. S.
FILED
JAN 31 1977
MICHAEL R. GORDON, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

SPARTAN ELECTRICAL CONSTRUCTION CO., INC.,
APPELLANT

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA AND FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT*

MOTION TO DISMISS

DANIEL M. FRIEDMAN,
Acting Solicitor General,

J. STANLEY POTTINGER,
*Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.*

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-823

SPARTAN ELECTRICAL CONSTRUCTION CO., INC.,
APPELLANT

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA AND FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT*

MOTION TO DISMISS

The Spartan Electrical Construction Company, Inc. (Spartan) is appealing from an order entered by a single-judge district court denying the company's claim that officials of the Environmental Protection Agency (EPA) acted illegally by recommending, without a hearing, that Spartan not be awarded a federally funded construction contract because of Spartan's failure to include a plan for minority hiring (Philadelphia Plan) as required by Executive Order 11246 and applicable regulations.¹

¹Pursuant to the requirements of EPA's construction grant regulations (40 C.F.R. 30.400 *et seq.* (1972 and 1973) and 35.935-6), Executive Order 11246 (30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303 and 34 Fed. Reg. 12985), regulations of the Office of Federal Contract Compliance of the Department of Labor (41 C.F.R. Chapter

1. The order of the district court entering judgment for EPA was summarily affirmed by the court of appeals on September 20, 1976 (J.S. 8-9). Any review by this Court is properly by petition for a writ of certiorari to the court of appeals,² and the Statement of Jurisdiction filed on December 15, 1976, should be considered as a petition for a writ of certiorari to that court. This Court has jurisdiction under 28 U.S.C. 2103 and 28 U.S.C. 1254(1). The appeal should be dismissed and the petition should be denied.

2. Pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 833, as amended by 87 Stat. 1069, 33 U.S.C. (Supp. V) 1281 *et seq.*, EPA awarded a grant to the Municipal Authority of the Borough of Morrisville, Pennsylvania (the grantee) for expansion of a waste treatment plant.³ The grantee published an invitation for bids on a portion of the construction⁴ and, in

60), and provisions of the "Philadelphia Plan" established by the Department of Labor (*Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159, 162-163 (C.A. 3), certiorari denied, 404 U.S. 854), the grantee of an EPA award must insure that minority hiring goals are incorporated in bids submitted for construction work under the grant.

²The case was heard and decided by a single-judge district court and a timely appeal was taken to the court of appeals. No challenge was made to any state statute or practice and no injunction was sought or issued against the enforcement of any state statute. Moreover, the judgment of the district court was entered on November 26, 1975, and the time for docketing an appeal in this Court expired on February 24, 1976.

³App. 5a, 12a. Because neither the district court nor the court of appeals entered a written opinion, and because the attachments to appellant's "Statement of Jurisdiction" do not include substantive parts of the record, the federal parties have lodged in this Court a copy of the Appendix prepared in the court of appeals proceedings. Record citations are to this Appendix.

⁴App. 262a.

accordance with EPA regulations,⁵ bidders were notified that bid documents must include an affirmative action plan to ensure equal employment opportunity.⁶ Although Spartan received bid specifications containing the required Philadelphia Plan forms prior to bid opening,⁷ the company submitted a bid which did not include completed forms. Therefore, Spartan was informed by the grantee that its bid, although low, was nonresponsive.⁸

The president of Spartan requested a meeting with EPA officials to discuss the company's bid, but was told by EPA that the agency could not recommend that the contract be awarded to Spartan because of the company's failure to include a Philadelphia Plan with the bid.⁹ EPA denied Spartan's subsequent request for a formal hearing.¹⁰

3. The district court found that "the only reason for the rejection of [Spartan's] bid was the fact that it did not comply with the bid requirements, that is, that it did not have attached thereto an appendix which would indicate the compliance or proposed compliance with the Philadelphia Plan."¹¹ Judgment was awarded for EPA and summarily affirmed by the court of appeals.

4. Affirmative action plan requirements may be included as covenants in federal assistance grants and

⁵40 C.F.R. 8.8(a)

⁶App. 262a, 267a.

⁷*Id.* at 119a, 126a.

⁸*Id.* at 99a, 123a-126a.

⁹*Id.* at 134a.

¹⁰*Id.* at 348a.

¹¹*Id.* at 260a.

represent a valid exercise of executive authority; federal agencies may properly refuse to recommend awards to contractors who fail to submit required plans. *Rossetti Contracting Co., Inc. v. Brennan*, 508 F. 2d 1039 (C.A. 7) (Chicago Plan); *Northeast Construction Co. v. Romney*, 485 F. 2d 752 (C.A. D.C.) (Washington Plan); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854 (Philadelphia Plan). A low bidder who fails to comply with affirmative action requirements may be denied a contract without an administrative hearing. *Commercial Envelope Manufacturing Co. v. Dunlop*, 10 E.P.D. para. 10,252 (S.D. N.Y.). The court below correctly determined that no hearing was required on Spartan's failure to comply with legitimate bid requirements.

For the foregoing reasons, the appeal should be dismissed and, treating it as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

JANUARY 1977.